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No. 82-1031

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JEFFERSON PARISH HOSPITAL
DISTRICT NO. 2 and
EAST JEFFERSON HOSPITAL BOARD,
Petitioners,

versus

EDWIN C. HYDE,
Respondent.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE OF LOUISIANA HOSPITAL ASSOCIATION IN SUPPORT OF PETITIONERS, JEFFERSON PARISH HOSPITAL, DISTRICT NO. 2 AND EAST JEFFERSON HOSPITAL BOARD

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QUESTION PRESENTED

Whether an arrangement by which a hospital grants a group of physicians the exclusive right to render all anesthesia services at the hospital is a *per se* illegal tying arrangement under Section I of the Sherman Act. 15 U.S.C. §1 (1976).

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INTEREST OF THE AMICUS CURIAE

The Louisiana Hospital Association (hereafter referred to as "the Association") is a trade organization composed of one hundred thirty-six (136) hospitals and organized under the laws of the State of Louisiana. The Association is the largest organization representing the interest of hospitals in

Louisiana. The member hospitals cover the spectrum of the hospital industry in Louisiana. The Association has as members hospitals with as few as twenty-one (21) beds and hospitals with more than six hundred (600) beds. The Association's members range from small and rural hospitals providing primary care to major teaching tertiary care centers located in urban centers. The Association's members are representative of every form of ownership and corporate status currently existing in the hospital industry. The Association's membership is composed of public non-profit community hospitals, private non-profit hospitals, for-profit hospitals, religiously owned hospitals, federally owned hospitals, state-owned hospitals, university-owned teaching hospitals and hospital service district hospitals such as East Jefferson Parish Hospital Service District Number Two.

The Association's members are ever cognizant of their obligation to provide high quality medical care to their patients in an economic and efficient maner. The governing boards of member hospitals recognize that they are ultimately responsible for the quality of the medical care rendered in their institutions. The Association and its members are vitally concerned in this case because the decision of this Honorable Court will affect the manner in which hospitals fulfill their obligations to their patients.

SUMMARY OF ARGUMENTS

Amicus Curiae Louisiana Hospital Association respectfully submits that an exclusive contract by which a hospital grants to a select group of anesthesiologists the exclusive right to provide all anesthesiologist services at the hospital should be considered a vertical restriction analogous to an agree-

ment by a manufacturer to limit the number and location of their distributors in a given geographical area and, as indicated in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed 2d 568 (1977), should be analyzed under the rule of reason.

Amicus Curiae Louisiana Hospital Association respectfully submits that the contractual arrangement between East Jefferson Hospital and Roux and Associates is not a *per se* illegal tying arrangement because there is an absence of two separate products or services. In this era of modern medicine and burgeoning medical malpractice liability, operating rooms are of no value without anesthesia services and vice versa. These services are sold together as a package and form one service, i.e. in-patient hospital surgical care.

Should it be determined that there exists a tying arrangement, such arrangement does not meet the test of *per se* illegality set forth in *United States Steel v. Fortner Enterprises*, 429 U.S. 610, 97 S.Ct. 861, 51 L.Ed. 2d 80 (1977) because there was no showing that East Jefferson General had the ability to raise prices, imposed burdensome conditions on patients, provided operating rooms that were unique or had some advantage not shared by competing hospitals.

Lastly, *Amicus Curiae* Louisiana Hospital Association respectfully submits that the Fifth Circuit erred in determining the relevant geographical market. According to the Fifth Circuit's guiding principle of a hospital's proximity to its patient population as the determinant of relevant geographical market, every hospital would constitute a separate and distinct relevant geographical market because area patients would prefer it to less proximate hospitals. Such an analysis

totally ignores the fact the hospitals compete on the basis of quality of their services and the availability of a large number of services. If all hospitals were of like quality and offered uniformly identical services, then, perhaps, the Fifth Circuit's holding would have some merit, but such a premise is totally divorced from the economic realities of the hospital industry.

ARGUMENT

The issue presented is whether an exclusive contract by which a hospital grants to a single group of anesthesiologists the exclusive right to render all anesthesia services at the hospital is a tying arrangement and illegal *per se* under Section I of the Sherman Act 15 USC §1 (1976). Section I of the Sherman Act 15 USC §1 (1976) states in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

The Federal District Court for the Eastern District of Louisiana, after a bench trial on the merits, held that the contract was not a *per se* violation of Section I of the Sherman Act 15 USC 1 (1976). *Hyde v. Jefferson Parish Hospital Service District No. 2*, 513 F. Supp. 584 (1981). Furthermore, the trial court held that the exclusive contract was legal under the rule of reason analysis articulated in *Standard Oil Co. v. United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911). In its decision, the trial court made several findings. It found that it was common practice for hospitals to enter into exclusive contracts with physicians who are engaged in certain hospital-based specialties, such as anesthesiology, radiology, pathology, etc. to insure the availability of

these services to their patients. It found that generally a patient does not specifically select a certain individual to perform these services, which increases the hospital's responsibility to insure the quality of services it provides 513 F. Supp. 532 at 540. The court found that the exclusive arrangment insures twenty-four-hour coverage; aids in the control and standardization of procedures and the efficient and less costly operation of the department; lends flexibility to the scheduling of operations; permits the physicians, nurses and other technicians to develop a work routine and proficiency in the use of equipment; simplifies maintenance of equipment and minimizes equipment breakdown; and lastly, increases the Board's ability to monitor the medical standards exercised. 513 F. Supp. 532 at 540. The trial court determined that the provision of anesthesia services is a medical service separate from the other services provided by the hospital. The hospital charges the patient a separate charge for this service 513 F. Supp. 532 at 540. The trial court defined the relevant geographic market as the market area in which the seller operates and to which the purchaser can practically turn for supplies, *U.S. v. Phillipsburg National Bank and Trust Company*, 399 U.S. 350, 90 S.Ct. 2035 (1970). Since the evidence indicated that 70 percent of the patients from the East Bank of Jefferson Parish went to hospitals in the metropolitan New Orleans area, the Court determined that the relevant market included the east banks of Jefferson and Orleans parishes which contained over twenty hospitals. 513 F. Supp. 532 at 540. The trial court also determined that while it is likely that a patient would choose to go to a hospital closest to his home, that factor was not proof that East Jefferson Hospital is a strong economic power in the market in which it competes. 513 F. Supp. 532 at 542-543.

After determining that the exclusive contract was not a *per se* illegal tying arrangement, the trial court analyzed the arrangement under the rule of reason. Following the guidelines established by the Court in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004 (1975) and *National Society of Professional Engineers v. U.S.*, 435 U.S. 679, 98 S.Ct. 1335 (1978) the trial court determined that the anti-competitive effect on the practice of anesthesia in the relevant market was minimal. Furthermore, the contract did not prevent Dr. Hyde or any other anesthesiologist from practicing in any hospital other than East Jefferson in the relevant market. The trial court concurred in the belief expressed by legal commentators[1] that such a contract enhanced the hospital's ability to compete.

The appellate court, citing the definition of a tying arrangement contained in *Northern Pacific Ry. v. United States*, 356 U.S. 1, 78 S.C. 514, 2 L.Ed. 2d 545 (1958) determined that a tying arrangement existed because ". . . it is clear that users of the hospital's operating rooms (the tying product) are also compelled to purchase the hospital's chosen anesthesia service (the tied product). It is also clear that we are dealing with two distinct services which a buyer should be able to obtain separately." 686 F.2d 286 at 289. The appellate court next determined that the trial court "applied a traditional method of economic analysis in this case . . ." and that "under the analysis applied to a truly competitive market, appellant has failed to prove an illegal tying arrangement." However, the appellate court apparently determined that the traditional economic analysis was inapplicable to the health care industry. "The foregoing analysis assumes that the

[1] Horan and Nord, "Application of the Antitrust Laws to the Health Care Delivery System," 9 Cumberland Law Review 665 (1979).

health care industry functions as a competitive market in the same sense as the industries involved in the plethora of other tying cases and should be subject to the same standards (citations omitted). This is not correct. Several market imperfections in the health care industry favor public, non-profit entities like East Jefferson Hospital." 686 F.2d 286 at 290. The market imperfections the appellate court spoke of are: 1) the prevalence of third party reimbursement eliminating a patient's cost consciousness, 2) a lack of information regarding the quality of medical care, 3) a patient's belief that a non-profit hospital has no profit motive to cut quality; and 4) a patient's desire to go to a hospital closest to his home. 686 F.2d 286 at 290. The appellate court then concludes that the trial court incorrectly defined the relevant market and that the correct relevant market was the East Bank of Jefferson Parish. 686 F.2d 286 at 291. The appellate court went on to enumerate the anticompetitive effects of the exclusive contract as : 1) prevents market entry by other anesthesiologists and 2) eliminates the surgeon's or patient's choice of anesthesiologists at this hospital. Lastly, the appellate court rejected arguments against the application of *per se* rules to the health care industry based upon its reading of this Court's decision in *Arizona v. Maricopa County Medical Society*,____ U.S., ____, 102 S.Ct. 2466 (1982).

The *Amicus Curiae* Louisiana Hospital Association believes the appellate court erred on several points. First, we believe the trial court and the appellate court both erred in determining the existence of two separate and distinct services —surgical operating rooms (the tying product) and anesthesia service (the tied service). The *Amicus Curiae* Louisiana Hospital Association contends that the hospital offered but

one service — high quality in-patient hospital care. Modern acute care hospitals such as East Jefferson General Hospital, combine a myriad of services into a single packaged product. In today's hospitals, the patient is provided not only a bed and meals, but highly sophisticated ancillary services such as radiology, pathology, respiratory therapy, laboratory services, nursing services and others. These ancillary services are not separate but rather integral components of one product, i.e. in-patient hospital care. To take the reasoning of the lower courts one step further, hospitals engage in illegal tying arrangements every time they require a patient to use the hospital's ancillary services. The appellate court would have it so that the patient would rent the bed from the hospital and contract with independent contractors for all other services. The patient would have to: hire his own pharmacist to provide pharmaceutical services, his own nurse to provide nursing services, hire his own pathologist to perform and analyze all tests, hire his radiologist to perform and interpret his x-rays, hire his own physical therapist to administer physical therapy while he is a patient in the hospital, and so on. Furthermore, it would be impossible for the hospital to adequately monitor the quality of the services rendered under such an arrangement. All of these services which hospitals currently provide as part of the patient's in-hospital stay would have to be obtained by the patient from other sources with little if any means of monitoring quality. Hospitals are not merely hotels for the ill or injured, where physicians and other health care practitioners, operating as independent contractors, ply their services to patients. The *Amicus Curiae* Louisiana Hospital Association agrees with Horan and Nord[2] that "exclusive relationships between physicians and hospitals are analogous

[2] Id. p. 702

to agreements by manufacturers to limit the number and location of their distributors in a given geographic region. The primary impact of this limitation is on the manufacturer's sales activity, not that of the existing distributors." The hospital is akin to the manufacturer, in that in developing its marketing strategy it has chosen an exclusive arrangement as the method of providing twenty-four-hour availability of anesthesia services and enhancing the marketing of its emergency services. The latter point was supported by the testimony of Mr. Gagliano who stated that East Jefferson General Hospital has the second busiest emergency room in metropolitan New Orleans, second only to Charity Hospital of New Orleans, the state-owned hospital for the medically indigent (Tr., V.4, p. 187). Indeed, East Jefferson General Hospital's emergency room volume may be due in large part to the public's awareness that the hospital's ancillary services of anesthesia, radiology, patholgy and emergency medicine are available at a moment's notice twenty-four-hours a day. The *Amicus Curiae* Louisiana Hospital Association believes that such arrangements should be viewed in the same light as the vertical restriction at issue in *Continental T.V. Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed. 2d 568 (1977). In the instant case, East Jefferson General Hospital, in effect, granted Roux and Associates an exclusive distributorship for the provision of anesthesia services within its facilities. As pointed out by this Court in *Continental T.V., Inc. v. GTE Sylvania, Inc.* (ibid) vertical restrictions promote interbrand competition by allowing the manufacturer (here the hospital) to achieve certain efficiencies (see trial court's discussion of benefits of closed staff, 513 F.Supp. 532 at 540) in the distribution of his products. This Court noted that economists have identified a number of ways in which manufacturers can use

such restrictions to compete more effectively against other manufacturers. For example, new manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer. Established manufacturers can use them to induce retailers to engage in promotional activities or to provide service and/or repair facilities necessary to the efficient marketing of their products. Service and repair are vital for many products, such as automobiles and major household appliances. Their availability and quality of such services affect a manufacturer's good will and the competitiveness of his product. The correlation to East Jefferson's situation is striking. East Jefferson General Hospital was a new entrant into the hospital market in 1970. The testimony of two of the hospital's board of directors amply illustrates the correlation of East Jefferson to this Court's statements in *Continental T.V., Inc. v. GTE Sylvania, Inc.* (ibid).

"Q. Dr. Rourke, you mentioned when your advisory group was interviewing candidates for various posts at the East Jefferson Hospital during the period before the hospital opened that your group assumed and that these positions would be filled by exclusive contract personnel. And why did you assume that they would be?

"A. Well, for several reasons. First, we have to cast ourselves back into the situation we're in back in 1970. We had an empty building sticking up there in the sky in the middle of a drain swamp, which had never been a hospital before, and we had a new, untried, untested venture. And we had to build from scratch.

We were not overwhelmed with eager people looking for the various jobs in the hospital base specially.

"I know that this trial is about anesthesiologists, but in my own recollection of the period, we had four separate jobs to fill. Anesthesiology was one of them. And in two of the areas we had to really persuade people. Come on in and give us a try. It was an unopened book. We had no fiscal experience. They had to cast in their lot with us and take the chance that we would be a success. In anesthesia —Well, we felt that each department of the four departments only required one man to get it started. And even some of those men applicants were unsure whether they would be able to make a living at it. It was an untested venture. So, we were looking for one good man in each area to come in to cast — tie his future to ours, work with us and build a department.

"Does that answer —

"Q. I'm not sure it does, but if that's your answer, I will accept it.

"A. Well, I'll try and clarify it more.

"Q. I asked you why you assumed that you would have to have a contract anesthesiologist?

"A. Well, as an outgrowth of what I just said, we wanted one man who was going to ally himself with our hospital. And we felt that a contract would assure us that he would stay with us and also that it would — a contract would be our assurance to him that he was going to grow with us. (Tr. Vol. 4, pp 149-150)"

Dr. Rourke's testimony illustrates how East Jefferson General Hospital used a vertical restriction in order to induce

competent and aggressive anesthesiologists to make the kind of investment of capital and labor and take the risks required in the distribution of products unknown to the consumer.

Just as the availability and quality of such services (service and repair) affect a manufacturer's good will and competitiveness of his product, so does the availability and quality of a hospital's ancillary services affect the good will and effectiveness of a hospital's product. This concern is illustrated by the testimony of hospital board member Nicholas Gagliano.

"Q. Mr. Gagliano, relative to a question of open or closed staff or exclusive contract, does the hospital have a policy at this time with respect to the department of anesthesia?

"A. Yes. The hospital has had from the beginning and has from time to time reexamined and reaffirmed the position that the anesthesia department would best be served as a closed staff arrangement under contract.

The same situation exists with three to five other departments in the hospital. Now, principal reason that I have for it, I'm a layman, of course, to the medical profession. This is my first and only experience in the operation of a hospital, and therefore, I'm extremely cautious as to what I do and what decisions that I make on behalf of the hospital. I have to deal with the health and life of people that are going to depend on this institution for health care.

My major concern, and I think that of most of the laymembers of the board, is to assure that we have adequate total professional coverage around the clock. When I mean coverage, I mean that we want to be absolutely certain that if an emergency comes

> in at 2:00 o'clock in the morning, that we have an anesthesiologist there and ready and able to give any anesthesia. We want a pathologist there to run lab tests. We want a radiologist there to take the x-ray pictures. And that is the major concern as I see it from my point of view as a lay board member. And our judgment has been that we can best serve this with a contract which binds a group of doctors to be at our hospital all the time. (Tr. Vol. 4, pp 172-173)"

This *Amicus Curiae* respectively submits that such an exclusive agreement should be treated as a vertical restraint and should be subject to the rule of reason analysis pursuant to *Continental T.V., Inc. v. GTE Sylvania, Inc.*, (supra).

Assuming that the exclusive arrangement was in fact a tying arrangement, the appellate court erred in determining the relevant geographical market and in applying the appropriate standard. Although the appellate court correctly sets forth the appropriate test as contained in *U.S. Steel v. Fortner Enterprises*, 429 U.S. 610, 97 S.Ct. 861, 51 L.Ed. 2d 80 (1977):

> "whether the seller has the power, within the market for the tying product, to raise prices or to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market. In short, the question is whether the seller has some advantage not shared by his competitors in the market for the tying product.
>
> Without any such advantage differentiating his product from that of his competitors, the seller's product does not have the kind of uniqueness considered relevant in prior tying-clause cases.

> Id. at 620-21, 97 S.Ct. at 867-68 (footnotes omitted), 686 F.2d at 290"

it failed to correctly apply that test. There was no evidence whatsoever that East Jefferson General raised prices. In fact, the appellate expressly found that the alleged tie-in did not result in a higher charge to the patient for anesthesia services. 686 F.2d at 291. Secondly, there was no evidence and the Fifth Circuit made no finding that East Jefferson General Hospital required patients to accept more burdensome terms within the market for operating rooms. There was no showing, and the Fifth Circuit made no determination, that East Jefferson General Hospital had some advantage not shared by its competitors in the market for operating rooms. Lastly, there was no showing, and the appellate court made no finding, that East Jefferson General's operating rooms were unique. The appellate court was unable to find any true market power on the part of East Jefferson under the traditional economic analysis. Therefore, the appellate Court boot strapped iteself into a *per se* violation by finding the health care industry to be an imperfect market and by redefining the geographical market area so as to exclude any hospitals on the East Bank of Orleans Parish from the geographical market. The Fifth Circuit ruled that the trial court erred in including the hospitals located on the East Bank of Orleans Parish within the geographical market for essentially three reasons: 1) the patient's preference for the hospital nearest his home, 2) the market imperfections inherent in the health industry that somehow favor public non-profit hospitals and 3) that because East Jefferson is a hospital service district its market area is limited by law to the East Bank of Jefferson Parish.

It is true that the third party payment system eliminates the patient's incentive to compare cost effectiveness of competing hospitals, however, all that means is that hospitals will not compete on the basis of price, but rather on the basis of quality and availability of services. *Robinson v. Magovern*, 521 F. Supp. 842 (1981) at p. 877. Furthermore, the absence of consumer cost consciousness benefits for-profit hospitals as much as non-profits. The appellate court determined in one breath that consumers were ignorant about quality of care and in the next breath assumed that consumers were informed as to the ownership status of the hospital, specifically, whether a hospital was non-profit or for-profit. It seems rather shortsighted to assume that a consumer's ignorance is limited to quality of care only and not the ownership status of a given hospital. Notwithstanding, the court theorizes that a patient believes that a non-profit hospital is less likely to cut quality than a for-profit one. However, the court ignores the fact pointed out in *Robinson v. Magovern* (ibid) that "When purchasing medical services, most consumer-patients look for high quality of care rather than for a low price" and therefore hospitals, non-profit and for-profit alike, strive to provide the highest quality of care possible. The appellate court then concludes that it is not surprising that these factors lead patients to select the hospital, in this case East Jefferson, closest to home. However, the appellate court's conclusion is contrary to the evidence which indicated that seventy percent of the patients residing on the East Bank of Jefferson Parish chose to go to hospitals in the Metropolitan area of New Orleans other than East Jefferson General Hospital. The trial court correctly held that the relevant geographical market area was composed of the hospital operating rooms in the East

Bank of Jefferson and Orleans Parishes because these were the alternate suppliers patients could practically turn to should East Jefferson General impose burdensome conditions or allow the quality or availability of its surgical facilities to deteriorate.

The appellate court seeks to bolster its determination that the East Bank of Jefferson Parish is the relevant geographical market by citing La. Revised Statute 46: 1055[3] which states in pertinent part that " . . . the commission shall have the duty and authority: 1) to represent the public interest in providing hospital and medical care in the district." The court's reliance on La. R.S. 46:1055 is unfounded for several reasons. First, the statute applies to the

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[3] § 1055. Powers and duties of commission

A. In addition to the duties defined elsewhere in this Chapter, the commission shall have the duty and authority:

(1) To represent the public interest in providing hospital and medical care in the district.

(2) To advise the police jury and the hospital director on problems concerning the operation of the hospital and other facilities.

(3) To make, alter, amend, and promulgate rules and regulations governing the conduct of the hospital.

(4) To conduct hearings and pass upon complaints by or against any officer or employee of the district.

(5) To review and modify, or set aside any action of the officers or employees of the district which the commission may determine to be desirable or necessary in the public interest.

(6) To appoint, with the approval of the medical staff, a director of the hospital and to perform such other duties as may now or hereafter be required by law.

(7) To appoint the necessary standing and special committees which may be necessary to carry out the purposes of this Chapter.

(8) To establish rates of pay for the use of facilities provided by the district.

(9) To enter into lease agreements with recognized and duly constituted nonprofit associations which are primarily engaged in the operation of hospitals.

B. In addition to the powers and duties set forth in Subsection A hereof, the commission may enter into a special services agreement with a hospital management firm or hospitals to manage, operate, and administer a hospital or hospitals, or any part thereof, under the control of the commission for the benefit of the hospital service district. The notice of intent to enter into a special services agreement shall be published in the official journal at least sixty days prior to the effective date of the contract.

Commission and not to the hospital. Secondly, hospital service districts are political subdivisions of the state. As such, they have the authority to expropriate property and to levy special maintenance taxes, La. R.S. 46:1064.[4] However, this authority is limited to the territorial boundaries of the district and La. R.S. 46:1051[5] requires the police jury creating the district to establish its boundaries. So the language in La. R.S. 46:1055 should not be viewed as a definition or restriction on a hospital's market but rather as a restriction on the expropriating and taxing power of the hospital service district. Therefore, Jefferson Parish Hospital Service District Number Two may market its hospital services to persons residing in Orleans Parish but it may not expropriate or levy a tax on property located in Orleans Parish. In essence, the appellate court determined the relevant market to be East Jefferson Hospital itself and this is clearly erroneous.

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[4] **§ 1064. Districts as political subdivisions; acquisition of land and physical facilities; special maintenance taxes; incurring debt; bonds**

The hospital service districts created under the provisions of this chapter are hereby declared to be political subdivisions of the state, and for the purpose of purchasing and acquiring lands and purchasing, acquiring, constructing and maintaining hospials, nurses homes, physicians and dentists offices, laboratories, and other physical facilities necessary to carry out the purposes of this chapter. Title to such land and physical facilities shall be in the public. Such districts shall be subdivisions of the State of Louisiana within the meaning of the laws of Louisiana relating to the voting and levy of special maintenance taxes incurring debt and issuing bonds therefor, including particularly but without limitation. Revised Statutes Title 39, Sections 501-518; 551-571; 575-577; 617; 701-706; 911.

[5] **§ 1051. Authority to create and alter the boundaries of districts**

The police juries of parishes are authorized and empowered, upon their own initiative, to form and create one or more hospital service districts within the respective parishes, or with agreement among police juries concerned, to combine two or more parishes into a single hospital service district with such names as the police juries may designate, and, in so doing, police juries may create hospital service districts whose boundaries overlap those of other hospital service districts.

The police juries are further authorized and empowered, upon their own initiative, to alter the boundaries of any hospital service district, provided that no such boundary change shall cause an impairment of the obligations of any contract of the hospital service district.

Such creation of overlapping hospital service districts or the alteration of the boundaries of any hospital service district prior to July 31, 1968, are hereby expressly validated, ratified and confirmed.

The appellate court enumerates the anti-competitive effects of the exclusive contract as being 1) preventing anesthesiologists from entering that part of the anesthesia service market which the hospital controls, lowers quality while increasing hospital profits and 2) eliminates the surgeon's or patient's choice of anesthesiologists at the hospital, which the court found to be economic coercion. 686 F.2d 286 at 290. The appellate court's phraseology is enlightening for it reveals that the court has, in fact, determined the relevant market to be East Jefferson General Hospital, and this conflicts with the Seventh Circuit's doubts that a relevant market can be sliced so small as to embrace only one hospital. *Dos Santos v. Columbus Cuneo-Cabrini Medical Center*, 684 F.2d 1346 (1982) at 1353. The Fifth Circuit's phraseology might be proper if East Jefferson General were the only hospital in the area, but it is not, for both the trial and appellate courts admitted there were twenty hospitals in the area.

The purported anti-competitive effects are not as they appear. First, market entry is not precluded. Nothing prevents an anesthesiologist from competing with Roux and Associates for East Jefferson General's exclusive contract. In fact, Dr. Hyde did just that when the hospital began its operations (Tr. Vol. 4, pp 195-196). The appellate court's language about denial of patient or surgeon choice is not substantiated. In *U.S. v. American Society of Anesthesiologists*, 473 F.Supp. 147 at 160, it was stated:

> "Anesthesiologists rarely have contact with patients prior to their surgery and the evidence suggests that fees are almost never discussed. In fact, patients have little input into the selection of their anesthesiologists and third party carriers pay over ninety percent of an-

esthesiologists fees. There is no evidence of competition between anesthesiologists insofar as patients are con-concerned, in fact, there is unrefuted evidence that the patient is not truly a customer of the anesthesiologist. (See also *Dos Santos v. Columbus-Cuneo-Cabrini*, 864 F.2d 1346 (1982) at 1354.)

From the above it can be determined that the appellate court erred in declaring the exclusive anesthesia contract a *per se* illegal tying arrangement under Section I of the Sherman Act 15 U.S.C. 1 (1976). It erred by its failure to show that East Jefferson General 1) was able to raise prices or, 2) able to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market or, 3) that it had some advantage not shared by competing hospitals in the market for operating rooms or, 4) that its operating rooms were unique.

CONCLUSION

This court has let it be known that the medical profession and the health industry will be subject to *per se* antitrust analysis. *Arizona v. Maricopa County Medical Society*, ____ U.S. ____, 102 S.Ct. 2466 (1982). However, it should be stressed that the Court in *Maricopa* was faced with a maximum price-fixing arrangement which is unquestionably the most naked form of restraint of trade. In the instant case, the Court must decide whether an exclusive anesthesia contract is a tying arrangement and, if so, whether it met the test of *per se* illegality articulated in *U.S. Steel v. Fortner Enterprises*, 429 U.S. 610 97 S.Ct. 861, 51 L.Ed. 2d 80 (1977). The Fifth Circuit determined that the contract in question met the requirements for *per se* illegality. *Amicus Curiae* Louisiana Hospital Association believes the appellate court erred in doing so. If it did not, *Amicus Curiae* Louisiana Hospital Association respectfully suggests that this Court reconsider the *per se* approach to tying arrangements. See Freed, Charles; "Reconsidering the Per Se Approach to Tying Arrangements," 13 Toledo Law Review 571-586 (Spring 1982).

CERTIFICATE OF SERVICE

I hereby certify that I have this _____ day of April, 1983 served copies of the attached Brief *Amicus Curiae* of the Louisiana Hospital Association by sending three copies thereof by first class mail, postage prepaid, to each of the following:

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